No. 10313.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NORTH AMERICAN AVIATION, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF NORTH AMERICAN AVIATION, INC., RESPONDENT.

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Statement of the Case.

In view of the shifting positions taken by the Board and the wide range of discussion indulged in by the Board in its brief, it becomes particularly important to note the issues herein as presented by the complaint. Likewise, it is important to set down, as clearly as possible, the opposing contentions, especially in view of the fact that the Board has never committed itself to any definite statement of its theory but deliberately states its contentions in a compound and complex form.

The Complaint.

Giving the widest possible scope to the allegations of the complaint, it charges that by the giving of a notice to its employees, respondent "did establish unilaterally a procedure for the settlement and adjustment of disputes or grievances" * * * "under which procedure grievances would be handled directly with the employees involved without the knowledge, consent, or participation of the Union." [Tr. p. 4.]

This is the entire charge.

The complaint therefore presented the issue of whether a procedure for the settlement of individual grievances of employees is invalid, unless established with the knowledge, consent, or participation of the Union.

It will be noted that there was no issue whatever as to the *scope* of the grievances for which presentation was provided in the notice.

Likewise that there was no objection to the *type of procedure* established, or to the act of the Company in giving notice of such procedure, except that the notice was given without consultation with the Union, and the grievances were to be handled directly with the employees involved without the Union's knowledge, consent or participation.

Statement of Issues.

Obviously, the charge was framed on the theory that there was no substantive right of individual presentation or adjustment of grievances, but only such right as the Union should consent might be exercised by the employee.

There was thus squarely presented the scope of the proviso of Section 9(a), 29 U. S. C., Sec. 159(a), which, after requiring collective bargaining with the exclusive representative of the employees, states:

> "Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

There was also presented for determination the legal effect of the provision of Article V of the Contract between the Company and the Union under the heading "GRIEVANCE PROCEDURE" [R. pp. 11, 15], Subdivision (10) of said paragraph reading as follows:

> "No provision of this Article shall be interpreted to prevent any employee or group of employees from presenting grievances to the management in accordance with the provision of Section 9(a) of the National Labor Relations Act."

In addition to the statutory right of grievance presentation given by Section 9(a), the individual employees had, *by contract,* an express stipulation that the grievance procedure established by the Union contract should not be interpreted to prevent the employees individually, or as a group, from presenting grievances to the management.

Obviously, the contract grievance procedure was not exclusive, and did not operate to restrict individual grievance presentation.

The Board in the course of these proceedings has asserted at least six different and divergent positions:

(1) That there is no right of individual grievance beyond the mere ministerial act of filing a grievance.

(2) That although an employee may file a grievance, he is powerless to bring it on for hearing or to proceed otherwise than through the Union.

(3) That even though an employee may present a grievance and may negotiate with the management up to the final stage of arbitration, he is powerless to enforce arbitration or to arrange for arbitration or other final disposition of his grievance without the consent of the Union; that it is the element of arbitration which condemns the procedure criticized.

(4) That although there is a right of individual grievance presentation and prosecution, there is, nevertheless, no right upon the part of employees to give notice of any method of any time, place, or means by which such grievance will be accepted or determined.

(5) That although there may be a right to individual grievance presentation and to give a notice of the method of procedure, the particular notice given in the present case is too broad as it did not limit the type of grievances to be received to those matters not related to the general agreement.

(6) That although there is a right of individual grievance presentation and prosecution to determination, and a right to give notice calculated to facilitate such presenta-

tion, nevertheless, the type of grievances which may be adjusted or settled by individual grievance presentation is limited to those without the scope of the collective bargaining agreement.

None of the foregoing contentions has any basis in the charge set forth in the complaint, which sets forth only two objections to the notice:

(a) it was sent without prior consultation with the Union, and

(b) it provided for grievance determination without the knowledge, consent, or participation of the Union.

The Board has persevered in one or more of the foregoing six contentions (other than those based upon the complaint) at all stages of the case, varying its position from time to time to meet the exigencies of the situation.

The Board's brief, likewise, at one point or another, urges all of the foregoing six contentions, skipping from position to position with all the dexterity of an old time circus performer engaged in riding six horses around the ring, jumping from one to the other regardless of divergent courses or objectives. It is especially difficult to determine the position of the Board upon any point, as it usually insists upon riding more than one horse at the same time.

All contentions, as well as the charge in the complaint, are stated in a compound and complex form.

The Board's brief has abandoned entirely the two charges contained in the complaint.

The first charge, as to sending the notice without consultation with the Union, is ignored.

The second charge, as to settlement of grievances without Union participation, is expressly withdrawn by the concession, at page 18, footnote 3, that the employee may "appear in person and without the representative, at each stage of the process," provided he uses the "single system" established by the Union contract.

The suggestion as to the use of the single system, however, is untenable for two reasons, (a) the contract procedure calls for presentation by a Union representative at all four steps subsequent to the first step in the grievance procedure, and (b) the Union contract expressly provides, Art. V, Subd. 10, that the procedure therein provided shall not prevent direct grievance presentation to the management under Section 9a.

The Board has substituted for argument, the liberal use of such cliches as "individual bargaining," "duality of representation," "dual grievance procedure," "unilateral establishment," "unilaterial dealing," and "company policy."

Respondent's brief devotes its entire point III (pp. 18-28) to the *scope* of the notice, thus indicating that the Board's present objection is mainly to the terms of the notice itself; but there was no issue whatever in the case either by the pleadings or the evidence as to the scope of the notice and the Examiner expressly refused to permit evidence as to the scope of such notice. [R. pp. 146-147.]

Specification of Errors Relied Upon by Respondent.

Respondent's position, briefly summarized, is that the Board erred in denying the validity of respondent's contentions as follows:

(1) There was no evidence at the hearing that the act of respondent complained of constituted an unfair labor practice affecting commerce. The matter of the giving of the notice, if it gave rise to a grievance in favor of the Union, is a matter for arbitration under the labor contract. There is no call for sidestepping determination by the regular method of arbitration and invoking the disciplinary action of the Board hearing and court action upon the mere charge that respondent has taken some unilateral action which the Union contends constitutes an infringement of its rights.

(2) Under the National Labor Relations Act there is a right of individual grievance presentation which involves the prosecution of such grievance to a final settlement.

(3) That by the express terms of the contract between the Company and the Union, the grievance procedure therein provided for the determination of grievances through the Union does not apply to any employees or group of employees desiring to invoke their right to present grievances to the management individually.

(4) That the right to present grievances individually involves a corresponding duty upon the part of the Company to receive, hear, and adjust the grievances by arbitra-

tion, if necessary, *i. e.*, by the utilization of a reasonably fair and effective procedure.

(5) That the necessity of providing for such a hearing and determination justifies, and in fact, necessitates, as a practical matter, the giving of a notice setting forth the date, place and manner of hearing and determination of the grievance.

(6) That any objection as to the scope or terms of the notice stating the method of determination of grievances is not available upon this proceeding, because there was no pleading or proof that the method suggested was improper, or, that other grievances than those properly determined individually were heard and passed upon.

(7) The order of the Board is too broad.

BRIEF OF THE ARGUMENT.

I.

There Was No Evidence at the Hearing That the Act of Respondent Complained of Constituted an Unfair Labor Practice Affecting Commerce.

The Matter of the Giving of the Notice, if It Gave Rise to a Grievance in Favor of the Union, Is a Matter for Arbitration Under the Labor Contract.

There Is No Call for Sidestepping Determination by the Regular Method of Arbitration and Invoking the Disciplinary Action of the Board Hearing and Court Action Upon the Mere Charge That Respondent Has Taken Some Unilateral Action Which the Union Contends Constitutes an Infringement of Its Rights.

The evidence is uncontradicted that the Union was recognized as the exclusive representative of the employees, and that the Company did bargain with it, and that the bargaining resulted in the consummation of a contract, and that respondent continued to bargain with the Union at all times. [R. pp. 3, 98, 106, 108, 111, 119, 120, 123-134.]

The present dispute is one which, under the terms of the contract, the parties are bound to arbitrate. It cannot be assumed that the arbitration provided for would result in an illegal or improper decree. If the employer is to be subjected to prosecution before the Board and the Courts for the giving of any isolated notice, or any other act on

its part, without the consent of the Union first obtained, then the entire purpose of the act, which is to foster and facilitate collective bargaining and the amicable settlement of disputes without resort to the courts, is frustrated.

The Board has assumed throughout that there was an affirmative duty on the part of the employer to enter into negotiations for collective bargaining with reference to the notice before the notice was sent out. This is contrary to all the decisions.

N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 344; 83 L. Ed. 682, 690.

II.

Under the National Labor Relations Act There Is a Right of Individual Grievance Presentation Which Right Involves the Prosecution of Such Grievance to a Final Settlement, Without Interference From the Union.

The right of individual grievance presentation is thoroughly settled in the decisions:

N. L. R. B. v. Union Pacific States (C. C. A. 9), 99 Fed. (2d) 153, 164;

General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Company, (C. C. A. 9), 132 Fed. (2d) 194;

N. L. R. B. v. Jones & Laughlin, etc. Corp., 301 U. S. 1, 44-45; 81 L. Ed. 893, 915-916;

Wilson & Co. v. N. L. R. B. (C. C. A. 8), 115 Fed. (2d) 759, 763;

Midland Steel Products Company v. N. L. R. B. (C. C. A. 6), 113 Fed. (2d) 800, 803;

N. L. R. B. v. Gutmann & Co. (C. C. A. 7), 121 Fed. (2d) 756, 759-60;

Precision Castings Co. v. Boland, 13 Fed. Supp. 877, 884 (D. C. N. Y.);

In re Shanty Shops, Inc., and Chain Service Restaurant Employee's Union, 8 Labor Relations Reporter, p. 840;

Noble v. State (Tex.), 17 S. W. (2d) 1063, 1064.

59 *Corpus Juris.*, p. 1093;

59 *Corpus Juris.*, p. 973;

Dooley v. Penna. Ry. Co. (D. C. Minn.), 250 Fed. 142, 143;

Coty v. Prestonettes, Inc. (C. C. A. 2), 285 Fed. 501, 514;

Galveston H. & S. A. Ry. Co. v. Hennigan (Tex.), 76 S. W. 452;

Grace Co. v. Williams, et al. (D. C. Mo.), 20 Fed. Supp. 263, 266.

III.

By the Express Terms of the Contract Between the Company and the Union, the Grievance Procedure Therein Provided for the Determination of Grievances Through the Union Does Not Apply to Any Employees or Group of Employees Desiring to Invoke Their Right to Present Grievances to the Management Individually.

By the agreement [R. pp. 11, 15] Article V, Subsection (10) the Union expressly agreed that the provisions of the Article entitled Grievance Procedure which established a method of presenting and determining grievances through the Union should not

> "be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9(a) of the National Labor Relations Act."

IV.

The Right to Present Grievances Individually Involves a Corresponding Duty Upon the Part of the Company to Receive, Hear, and Adjust the Grievances by Arbitration, if Necessary, i. e., by the Utilization of a Reasonably Fair and Effective Procedure.

The right of an individual employee, or group of employees, to present grievances, is not limited to the mere filing thereof. The statutory right, and also the contract right, granted to employees, to individually present their grievances to the employer, involves the corresponding duty on the part of the employer to hear and adjust such grievances.

Grace Co. v. Williams (D. C. Mo.), 20 Fed. Supp. 263, 266;

Noble v. State (Tex.), 17 S. W. (2d) 1063, 1064;

59 *Corpus Juris.*, p. 1093;

59 *Corpus Juris.*, p. 973;

Dooley v. Penna. Ry. Co. (D. C. Minn.), 250 Fed. 152, 143;

Coty v. Prestonettes, Inc. (C. C. A. 2), 285 Fed. 501, 514;

Galveston H. & S. A. Ry. Co. v. Hennigan (Tex.), 76 S. W. 452.

V.

The Necessity of Providing for Such a Hearing and Determination Justifies, and in Fact, Necessitates, as a Practical Matter, the Giving of a Notice Setting Forth the Date, Place and Manner of Hearing and Determination of the Grievance.

The Company, in order to comply with its duty of hearing and determining the grievances, was required to designate a representative to hear the grievance, to fix a time and place where it might be heard, and make some reasonable arrangement for the disposition of the grievance.

The employer has the duty, in the orderly conduct of its business, to give notice of the date, place, manner, and persons to whom the individual grievances may be presented, and to provide for a method of receiving and adjusting such grievances. In a concern having many thousands of employees, it is vitally necessary in order to maintain a consistent grievance procedure and avoid discrimination, that notice of such arrangements be imparted to the employees. In the absence of such a notice no real opportunity of presentation is afforded.

VI.

Any Objection as to the Scope or Terms of the Notice Stating the Method of Determination of Grievances Is Not Available Upon This Proceeding, Because There Was No Pleading or Proof That the Method Suggested Was Improper, or That Other Grievances Than Those Properly Determined Individually Were Heard and Passed Upon.

The complaint did not allege that the notice was too broad or went beyond its proper scope. The sole charge was that the notice was sent without the knowledge or consent of the Union, and provided for determination of grievances without the Union's knowledge, consent or participation.

The Company's offer of proof with respect to its attempting to supersede the notice by a new notice obviating the Union's objections as to the form of the previous notice was rejected by the Board. [R. pp. 110-111.] The offer of proof as to what grievances had been handled under individual grievance procedure was also rejected. [R. pp. 146-137.] There is neither claim nor proof that the scope of the grievances extended beyond those permitted by the Act.

It cannot be assumed in the absence of evidence that the law has been or will be violated, but, on the contrary, there is a presumption that the law will be obeyed.

Again there was no issue whatever in the complaint as to the legality of the provision for arbitration as the final step in grievance handling or as to the efficacy or fairness of the particular method suggested in the notice.

VII.

The Order of the Board Is Too Broad.

The sole issue is the propriety of the giving of notice of the method for handling individual grievances, without the consent of or consultation with the Union. The Board, even if its charges were sustained, could only direct the recall of the notice. It could not even direct a modification of the notice as there was no issue as to the scope of the notice.

N. L. R. B. v. Express Pub. Co., 312 U. S. 426, 436-6; 85 L. Ed. 930, 937;

Bethlehem Steel v. N. L. R. B. (C. C. A. D. C.), 120 Fed. (2d) 641, 707-8.

ARGUMENT.

I.

There Was No Evidence at the Hearing That the Act of Respondent Complained of Constituted an Unfair Labor Practice Affecting Commerce.

The Matter of the Giving of the Notice, if It Gave Rise to a Grievance in Favor of the Union, Is a Matter for Arbitration Under the Labor Contract.

There Is No Call for Sidestepping Determination by the Regular Method of Arbitration and Invoking the Disciplinary Action of the Board Hearing and Court Action Upon the Mere Charge That Respondent Has Taken Some Unilateral Action Which the Union Contends Constitutes an infringement of Its Rights.

The charge and finding that respondent has refused to collectively bargain is absurd in view of the uncontradicted evidence that respondent has at all times bargained in good faith with the Union in all matters of collective bargaining, including the labor contract, Union grievance procedure, and individual grievance procedure. [R. pp. 3, 98, 106, 108, 111, 119, 120, 124-134.] The very notice which is the basis of the present complaint was carried through the first four steps of the regular grievance procedure and up to the point of arbitration itself. *It was, in fact, the Union which refused to negotiate further.* [R. pp. 124-134.] The Company offered to prove that it had gone so far as to prepare a second notice superseding the criticized notice. A copy of the second

notice, which was prepared to meet the Union's objections, appears in the record as Exhibit "B." The second notice would have been distributed to all employees if the Union had not instituted the proceedings before the Board. An offer of proof of these matters was rejected by the Board. [R. pp. 110-111.]

The Company further offered to show that only two grievances had been handled under the procedure provided for by the notice upon which the charge is based, whereas more than 800 had been disposed of under the regular contract grievance procedure. This offer of proof was rejected by the Board. [R. pp. 146-147.]

However, the Board states in its decision that "the Board accepts as true the facts which the respondent offered to prove. Assuming their truth, they do not affect the Board's decision as hereinafter set forth." [R. p. 51, footnote 3.]

There was no charge of any coercion, restraint, or interference, and no evidence thereof. The facts thus indirectly conceded by the Board conclusively answer any possible contention that any misunderstanding, coercion, or restraint resulted or could result from the giving of the notice complained of.

There is no proof whatsoever of any refusal to bargain collectively with the Union as the exclusive representative of the employees, or that respondent has engaged, or is engaging in any unfair labor practice within the meaning of Section 8(1) or Section 8(5) of the Act, or that the

act of respondent complained of constituted an unfair labor practice affecting commerce or the free flow of commerce in any manner whatever.

The Board's findings on these jurisdictional issues are entirely unsupported. Under the agreement between the Company and the Union [Exhibit "A" of the complaint] the act charged in the Board's complaint, at most, could give rise to a claim or grievance on the part of the Union for which amicable settlement was provided by the grievance procedure.

There was nothing in the evidence to indicate that a labor dispute would or could arise, or that the parties would not carry out the terms of the contract and proceed to settle the dispute upon which the present complaint is based, by arbitration. Likewise, there can be no assumption that the arbitration thus provided for would result in any illegal or improper award.

There was no evidence whatever of any request on the part of the Union to negotiate this particular dispute, except the admitted fact that the dispute was negotiated up to the point of arbitration. [R. pp. 124-134.]

There is no refusal to negotiate where there is no request to negotiate.

> *N. L. R. B. v. Columbian, etc. Steel Co.*, 306 U. S. 292, 297-298; 83 L. Ed. 660, 664:
>
> "To put the employer in default here the employees must at least have signified to respondent their desire to negotiate."

N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 344; 83 L. Ed. 682, 690:

"There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefore by the employees."

Great Southern Trucking Co. v. N. L. R. B. (C. C. A. 4), 127 Fed. (2d) 180, 185:

"It is elementary that the National Labor Relations Act does not compel an employer to seek out his employees or request their participation in negotiations for purposes of collective bargaining."

In view of the record, the charge and finding that respondent has refused to bargain collectively has a very hollow ring.

Admittedly the National Labor Relations Act contemplates individual presentation of grievances in some method; admittedly the contract by the respondent contemplates individual grievance presentation (Article V, Subd. 10); admittedly the Union grievance procedure provided by Article V does not apply to or affect the right or manner of individual grievance presentation. Any dispute relative to the contractual provision of individual grievance presentation is expressly made subject to arbitration by the labor contract.

Out of the many grievances which the Union has presented and adjusted, and settled through the contract grievance procedure, it has seized upon this particular in-

stance as one in which it will not submit to the award of an arbiter, but has elected to put the Company to the expense and trouble of a formal hearing before the Board, and contempt proceedings before this court.

If an arbitration clause can thus be avoided by the Union and the employer penalized by being subjected to prolonged and expensive litigation before the Board and Appellate Courts, then the entire purpose of the Act will be frustrated.

There is no action which the Company can take in the prosecution of its business which will not equally expose it to a charge of "refusing to collectively bargain." The Union could always assert that *any* act of the Company, regardless of whether it was taken in the utmost good faith, was "without consultation with or consent of the Union," and force the employer to expensive court proceedings to establish its willingness to negotiate and the refusal on the part of the Union to negotiate, and that the action taken was in good faith.

It is submitted that the present case directly presents to this court the issue of the propriety of the Board and the courts taking jurisdiction of such a controversy between the parties to a contract as to the meaning of the terms thereof, when such contract contains within itself a reasonable and automatically operative provision for final determination of any such dispute. The court is being asked to lend a hand to the arbitrary repudiation by one of the parties of the contractual requirement of arbitration.

II.

Under the National Labor Relations Act There Is a Right of Individual Grievance Presentation Which Right Involves the Prosecution of Such Grievance to a Final Settlement, and Without Interference From the Union.

It was the contention of the Board's attorney and also of the counsel for the Union that the right of individual grievance presentation provided by Section 9(a) and also by the contract, Article V, Subdivision (10), was limited to the mere "filing" of a complaint (and that the employee could do nothing beyond filing). Any further action would have to be taken through the Union. Nor could he require any action to be taken with regard to the complaint so filed.

At the oral argument in Washington, counsel for the Union receded from this position, for the first time, to the extent that he conceded that there was a limited right of grievance presentation without the scope of the Union's jurisdiction.

> "The Chairman: Yes. You couldn't do anything more than present them; no obligation.
>
> Mr. Kaplan: No; *we are not contending that matters outside the scope of our jurisdiction can't be adjusted* . . ." [R. p. 46.]

The Board's position in its brief, pages 12-17, is now apparently

(1) that the matter of grievance procedure "is an appropriate subject of collective bargaining" (p. 13), and

(2) that "*after* a grievance procedure has been agreed upon with the exclusive representative of the employees" the employer may not hear individual grievances through any other procedure (pp. 17-18).

In other words, the Board still contends that whatever right of grievance presentation exists, it must be exercised and prosecuted through the Union, or through a method negotiated by the Union, and not otherwise. No cases whatever are cited which support this contention.

The cases, without dissent, establish (1) that the right to present grievances is not limited to the mere filing of a complaint; (2) that the statutory right granted to employees individually to present their grievances involves the corresponding duty on the employer to hear and adjust such grievances (see point IV, *infra*); and (3) that such grievances, without limitation, may be prosecuted by the employee to final settlement or adjustment, without interference from the Union.

(a) The Right of an Individual Employee or Group of Employees to "Present" Grievances Is Not Limited to the Mere Filing of a Complaint.

The statute (Section 9(a)) gives to the individual employee "the right at any time to present grievances to their employer."

The contract, Article V, Subsection (10), provides that the terms of the Article "Grievance Procedure" shall not be interpreted "to prevent any employees or group of employees from presenting grievances to the management in

accordance with the provisions of Section 9(a) of the National Labor Relations Act."

The right to present grievances implied the right to obtain their consideration. Webster's Dictionary defines the word "present":

> "to lay before, or submit to, a person or body for consideration or action; as, to present a . . . petition . . ."

In *Noble v. State* (Tex.), 17 S. W. (2d) 1063, 1064, the word "present" is defined as follows, quoting Century Dictionary:

> " 'Present' means 'to lay before a judge, magistrate, or governing body for action or consideration; submit, as a petitioner, remonstrance, etc., for a decision or settlement to the proper authorities.' "

The very fact that special provision is made for individual employee petitions shows that Congress was giving to the employee a right which otherwise would have been inhibited by the general provision.

> 59 *Corpus Juris.*, p. 1093:
>
> "Another generally accepted rule of construction is an exception of a particular thing from the general words shows that, in the opinion of the law-giver, the thing excepted would be within the general provision had not the exception been made."

The rule of the decision cited under subhead (c) *infra* is that an employee may not only present his grievances but may obtain a hearing and effect an adjustment.

(b) The Statutory Right and Also the Contract Right Granted to Employees to Individually Present Their Grievances to the Employer Involves the Corresponding Duty on the Employer to Hear and Adjust Such Grievances.

See point IV, *infra*.

(c) Such Grievances Without Limitation May be Prosecuted by the Employee to Final Settlement or Adjustment Without Interference From the Union.

In *N. L. R. B. v. Union Pacific Stages* (C. C. A. 9), 99 Fed. (2d) 153, 164, there was evidence that the General Superintendent of the Company had settled directly with individuals who had presented grievances to the Company, and the Board found that, in settling directly with the individuals involved, the Company was attempting to arouse in the employees "the feeling that it was superfluous to negotiate with the management through the Union," and that such conduct constituted interference with the rights of its employees under the Act. (p. 163.) In that case this court held:

> "The above quoted finding indicates that the Board followed the position asserted by the attorney for the Union to the effect that an employer under the circumstances was deprived of any right to make any settlement of a grievance directly with an employee even as in this case where the representatives of the Union acquiesced in the suggestion that it be accomplished in that way.
>
> "This was not a correct interpretation *either of the agreement or the law.*
>
> "Section 9(a) of the Act, 29 U. S. C. A. sec. 159(a), contains the proviso that 'any individual employee or a group of employees shall have the right

at any time to present grievances to their employer.' Thus the Act does not inhibit *adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class.* This view finds support in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. Here, again, referring to the case of Virginian R. Co. v. System Federation, *supra,* the Supreme Court at pages 44 and 45, 57 S. Ct. at pages 628 said: 'We also pointed out that, as conceded by the government, the injunction against the company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts, generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the company might "elect to make directly with individual employees." We think this construction also applies to section 9(a) of the National Labor Relations Act.' " (p. 164.)

This court further held that the general authority of the spokesman for the Union did not include the power to waive the individual seniority rights of employees, as the matter of seniority primarily concerns the relation of the employees, not to the Company but to each other, the court saying:

"Upon the hearing a discussion arose between counsel representing the Union and respondent's at-

> torney as to certain legal questions involved in the fixing of seniority rights. It was there and is here contended on behalf of respondent that negotiations between the Union and the employer ordinarily are with respect to general working conditions, hours of labor and wages, and such matters where the interests of all the employees are the same and where any advantage secured by the Union for one member inures to the benefit of all; but that this is not true with respect to the question of seniority where the interests of the older and the younger employees are directly in conflict. The existence of this legal phase of the controversy was admitted by Union counsel at the hearing. Moreover, as the evidence discloses, matters of seniority primarily concern the relation of the employees, not to the company, but to each other. Rights taken from those new in the service go to benefit the older employees in the company. Thus any change of seniority status established by the contract *would affect the personal rights of the individual employee rather than those of the group.*" (Emphasis ours.)
>
> *N. L. R. B. v. Union Pac. Stages, Inc.*, 99 Fed. (2d) 153, 164-5.

The ~~Union's~~ Board's brief attempts to distinguish the *Union Pacific Stages* case (pp. 26-27, footnote), asserting that the distinction is that the Union had acquiesced in direct settlement. Also that in the present case the procedure contemplates dealing with an individual employee "concerning a matter covered by a collective bargaining contract affecting *all* of the employees."

Neither situation constitutes a distinguishing circumstance.

In the first place, the present contract expressly excludes individual grievance presentation from the operation of the contract Union grievance procedure; so that it may be equally said that the Union, in consenting to such exclusion of such individual grievance presentation from the provisions of Article V, has "acquiesced in direct settlement of a grievance."

Moreover, the Union's contention, in support of the Board's jurisdiction, has been that the particular act complained of on the part of respondent, *i. e.,* giving notice of the method of handling individual grievances, was so heinous and so contrary to public policy, that the National Labor Relations Board was justified in stepping in and ousting the tribunal provided by the contract for settlement of such a dispute. If this is true, the Union could not give any validity to such a procedure by consenting thereto.

The basic question remains: Is direct employer-employee grievance settlement illegal? This court has expressly held that it is not.

In the second place, there was also a labor contract in eistence between the employer and Union, covering *all* the employees, in the *Union Pacific Stages* case.

In a recent case *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Company* (C. C. A. 9), 132 Fed. (2d) 194, this court has pointed out very cogent reasons for allowing an employee to present and prosecute individually any griev-

ance claimed by him, and has shown the unfairness of requiring him to abide by the representation of a particular labor organization. This court said:

> "The Engineers' Committee contends that the engineer party suing on his individual contract with the Railway can 'elect' to have no labor organization representing him other than the Engineers' Committee. The startling injustice of this contention appears from the following: Assume three engineers, each asserting that he is entitled by a seniority to have an engine on a certain run. The Railway has decided that A has the seniority. B and C each claims that he is the senior. This may involve a pure question of fact as to date of employment, or resignation and return, or other easily imaginable factual situations. It is destructive of the fundamental concept of representation in such a justifiable controversy that the engineers B and C, each claiming the other not entitled to the run, must have the Engineers' Committee as his representative. Obviously the Engineers' Committee cannot act for both.
>
> "More aggravating circumstances can be added to this situation. Such as, that one of the two engineers having the claim against the Railway is a member of the Engineers' Brotherhood in good standing, with his dues paid, and the other, not a member of the Engineers' Brotherhood, has been its bitter opponent and critic. The relationship of confidence and trust necessary between a suitor and his representative would be entirely absent in the second case. . . .
>
> "What the Engineers' committee is contending is that instead of there being the above described three statutory steps in the process, there must be four steps. There would be three tribunals instead of two before whom he must litigate, the first being a union

of which he is not a member, in which he litigates his claim against a member of the Union. * * *

"The Engineers' Committee also contends that its position is aided by the provision of Section 2, Sixth, with respect to conferences with the employer, as follows: 'Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . .' But in this it ignores the fact that Section 2, Fourth, provides that the engineer may confer individually or through his local representative, a provision which supersedes every other provision in the Act, including Section 2, Sixth. As seen in footnote 4, above, the Engineers' Schedule contains no provision for representation in grievances arising from a claimed breach of the engineer's individual employment contract."

Gen. Com. etc. v. Southern Pac. Co., 132 F. (2d) 194, 198-199.

In *N. L. R. B. v. Jones & Laughlin, etc. Corp.*, 301 U. S. 1, 44-45; 81 L. Ed. 893, 915-916, in reviewing its prior decisions under the Railway Labor Act, the court said:

"We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen

representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to Sec. 9(a) of the National Labor Relations Act.

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' The Act expressly provides in section 9(a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and bring about the adjustments and agreements which the Act in itself does not attempt to compel."

N. L. R. B. v. Jones & Laughlin, etc. Corp., 301 U. S. 1, 44-45, 81 L. Ed. 893, 915-916.

In *Wilson & Co. v. N. L. R. B.* (C. C. A. 8), 759, Fed. (2d) 759, 763, the court said with reference to the requirements of collective bargaining:

"It obligates the employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees with respect to all matters which affect his employees as a

class, including wages, hours of employment, and working conditions. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; National Labor Relations Board v. Union Pacific Stages, Inc., 9 Cir., 99 F. (2d) 153, 159, 164. *It does not however, prohibit individual employees or groups of employees from negotiating with the employer concerning grievances.*"

Wilson & Co. v. N. L. R. B., 115 Fed. (2d) 759, 763.

The case of *Midland Steel Products Company v. N. L. R. B.* (C. C. A. 6), 113 Fed. (2d) 800, 803, is a direct answer to the Board's holding that the notice complained of constituted an improper soiicitation of individual grievance presentation. The Board based its Cease and Desist Order upon a letter sent to the employees by the Company's Works Manager at the time of the Union's organization campaign, and containing the following:

"Under this act (The Wagner Act) you have the right to name anyone you choose to represent you. You do not have to join any organization.

"Our policy is to be fair to each employee in every way.

"I would appreciate your dropping in to my office at any time to discuss our future policies and your suggestions how to make this a happier and better plant in which to work."

The court said:

"Assuming that the Board was correct in regarding the last part of the letter as an appeal to individual bargaining, the Act does not prohibit this practice

National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. We do not understand that the statute forbids the employer, where he is innocent of coercion, interference, or restraint, to suggest individual conferences with his men nor even to advocate the advantages which grow from individual conferences, nor do we understand that such a suggestion of itself constitutes an element of interference, coercion or restraint. . . . The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress, and undue influence.

"This letter exerts no pressure. It does not express nor intimate the opinion of the employer as to the merits of unionization or of nonunionization, or as to the merits of any particular union or organization. It constitutes an effort to secure cooperation between the 'front office' and the workers themselves, that is, to secure one of the objectives of the National Labor Relations Act, which, as stated in its title, is 'to diminish the causes of labor disputes.'

Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) 800, at 803, 804.

In *N. L. R. B. v. Gutmann & Co.* (C. C. A. 7), 121 Fed. (2d) 756, 759-60, the employer distributed a pamphlet to each of its employees, the 8th paragraph of which read as follows:

"Individual Bargaining.

"8. An employee cannot be compelled to select any other employee, group or organization to bargain

> for him. Any employee is absolutely free to bargain for himself, and make his own individual arrangement concerning his employment on a basis mutually satisfactory to the management and himself."

In denying a petition for enforcement, the court held that this communication was not objectionable.

In the case of *Precision Castings Co. v. Boland*, 13 Fed. Supp. 877, 884 (D. C. N. Y.), the court said:

> "It is true that the act requires the employer to bargain with representatives of the majority of the employees of any appropriate unit. It goes no further than that. *It does not preclude other employees from presenting their grievances and from being heard.*"

The case of *In re Shanty Shops, Inc., and Chain Service Restaurant Employee's Union* (N. Y.), 8 Labor Relations Reporter, page 840, cited by the Union at the hearing in Washington, is a direct holding in support of respondent's position.

In discussing the proviso of Section 704(7) of the New York Labor Relations Act to the effect that "employees, directly or through representatives, shall have the right at any time to present grievances to their employer," the court said:

> "We believe that Section 704(7) is modified by all of Section 705 and not merely by the proviso to one subdivision thereof. It is clear from both the language of the proviso and its context in the above subdivision of Section 705 that the proviso *was intended by the Legislature merely to preserve the right of individual employees or minority representatives to*

present grievances, where there exists a majority representative for the purposes of collective bargaining. The proviso, affording to employees or their representatives 'the right at any time to present grievances' qualifies the main body of a subdivision which arms majority representatives with exclusive bargaining power.

"It thus serves to restrict what otherwise might be a grant of unlimited power to a majority union, in the exercise of which individual or minority rights might be completely destroyed. The proviso further assures employers that they are free if they desire, to discuss grievances with individuals or minority representatives, even though a majority representative has been designated for the purpose of collective bargaining."

(d) The Cases Cited by the Board do Not Support Its Contention That Individual Grievance Presentation Is Prohibited.

The quotation from *Humble Oil and Refining Company v. N. L. R. B.* (C. C. A. 53, 113 Fed. (2d) 85, 87, appearing at page 24, has to do, as appears from the face of the court's statement, with the binding effect of a labor union contract, and the term "bargain" is used with reference to the making of such a contract.

The statement appearing at page 25, quoted from the case of *N. L. R. B. v. Knoxville,* 124 Fed. (2d) 875, 881-2, refers, as the court carefully points out in its opinion, to bargaining by the collective agent "with respect to wages, hours, and other conditions of employment."

The only additional cases are the *National Licorice* cases, and other cases appearing at footnote 19, page 25. All these cases involved individual contracts exacted by the employer.

In the *National Licorice Company* case, the employee was required to agree not to demand a closed shop. Also the propriety of his discharge was not to be subject to arbitration.

In the *Highland Shoe, Inc.,* case, 119 Fed. (2d) 218, 221, footnote 20, page 27, the reference is to an employer bargaining with his employees individually concerning a wage reduction.

Accordingly, it is submitted that the decided cases have established, beyond dispute, the substantive right of the employee to present any grievance which he desires to present to his employer directly. This would be true even if the contract with the Union did not recognize any right of individual presentation. However, as we shall see in the succeeding point, the contract expressly reserves such right and leaves it free from any interference by the Union and any restrictions by the Union grievance procedure.

The employer is under the corresponding duty to hear and adjust such grievance, and, if a settlement can not be arrived at by mutual agreement, to provide for determination by an impartial tribunal.

In objecting, throughout its brief, that recognition of any right of grievance presentation by an employee would

seriously "undermine" or embarrass the Union, the Board overlooks the guiding principle enunciated by the decisions that the employee's right to present grievances is a right which must be free from interference from either the Union or the employer.

The suggestions of the Board's counsel to the effect that individual adjustment of grievances operates to the prejudice of the Union, or to limit the scope of the Union's collective bargaining power (Br. p. 12), is an argument addressed entirely to the wisdom of the enactment. This issue, however, is solely within the legislative domain. The courts cannot deny effect to the proviso of Section 9(a) upon the ground that it might embarrass the Union, or possibly lead to difficulties in administration. Congress has given the individual the "parallel" or "dual" right of grievance presentation. The statutory right of individual grievance presentation is expressly recognized and enforced and withdrawn from the operation of the procedural method provided by Article V by the terms of the Union contract.

The right of the employee to refuse to join or act through a labor organization is of equal value, as this court has said, to the right to organize; and the individual rights of the employee against any interference, domination, or coercion by the Union are entitled to the protection of the Board.

In *N. L. R. B. v. Sterling Motors* (C. C. A. 9), 109 Fed. (2d) 194, 202, this court said:

> "That is the right not to join or create or assist any labor organization at all, but to deal individually with the employer. What we have described above regarding the result of 'normal relations and innocent communications' between employers and employees properly may lead the latter to choose to remain unorganized. The Supreme Court construes a predecessive statute for the protection of collective bargaining as not prohibiting the employer's 'entering into such contract of employment as it chooses, with its individual employee,' Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515, 557, 57 S. Ct. 592, 604, 81 L. Ed. 789, and puts a like construction upon the National Labor Relations Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352 . . .
>
> "Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board."

To the same effect is:

Valley Mould & Iron Corp. v. N. L. R. B. (C. C. A. 7), 116 Fed. (2d) 760, 764.

III.

By the Express Terms of the Contract Between the Company and the Union, the Grievance Procedure Therein Provided for the Determination of Grievances Through the Union Does Not Apply to Any Employees or Group of Employees Desiring to Invoke Their Right to Present Grievances to the Management Individually.

By the agreement [R. pp. 11, 15] Article V, Subdivision (10) the Union expressly agreed that the provisions of the Article entitled Grievance Procedure which established a method of presenting and determining grievance through the Union should not

> "be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9(a) of the National Labor Relations Act."

The first nine subdivisions of Article V [R. pp. 11, 15] provide for adjustment of grievances through various steps beginning between the aggrieved employee and his foreman, or with his representative and his foreman, and continuing through the district steward and the plant grievance committee dealing with designated representatives of the management, and finally, by Article VI [R. pp. 15-18] the procedure for arbitration is fixed.

The Board has consistently refused to give any effect to Subdivision (10), by which is excepted from the operation of Article V, the employees' right of individual grievance presentation.

In fact, the Board has construed the contract directly *contrary* to the provisions of Subdivision (10) and would,

in effect, rewrite the contract to provide that the provisions of Article V *shall apply* to individual grievance presentation.

The Board states in its brief, page 16:

> "Of course, the provisions of the collective contract establishing a grievance procedure, like the provisions covering any other appropriate subjects of collective bargaining, extend to *all* of the employees in the bargaining unit."

But the provisions of the collective contract, even though it applies to all employees, expressly exempt from its operation the right of *any* individual employee to present grievances "to the management."

Again at page 18, the Board states (footnote):

> "But the Board's construction of the proviso (referring to Section 9(a), insures such orderliness and uniformity; *it requires the parties to use the single system established by agreement* between the employer and the representative, except that employees are free to appear in person and without the representative, at each stage of the process."

This is an explicit statement which can mean nothing less than that the Board has rewritten the contract between the Company and the Union to eliminate Subdivision (10) of Article V, and to insert instead thereof a provision that the "procedure or single system" set up by Article V shall be used by all employees, whether presenting grievances through the Union or individually.

The Board's own statement shows the complete untenability of the Board's position.

The only justification attempted for the violence done to the contract of the parties is the suggestion that all grievances, including individual grievances, must be disposed of in accordance with the contract provisions, and all the precedents and interpretations established by the contract grievance procedure rulings.

Even if the Board or the court were free to thus rewrite the contract and impose upon the parties a totally different contract from that which was entered into, we submit that the attempted justification is wholly futile. Uniformity of determination is not an end in itself. Furthermore, uniformity of determination is not assured, even by the contract grievance procedure.

Finally, there can be no presumption that any determination through arbitration or otherwise, as provided by the notice complained of, will be an illegal and incorrect or an unjust determination. Much less can there by any presumption that it will be contrary to or different from other interpretations or rulings obtained through use of the contract grievance procedure.

Of course, if the Union feels aggrieved by any action taken by the Company in connection with the provision for hearing of individual grievances or by reason of any determination had upon any hearing of such individual grievances, whatever legal grievance the Union might sustain would be remediable under the procedure for arbitration provided by the terms of the contract. These provisions the Union has not seen fit to invoke in the present case.

The Board's solicitude on behalf of universal enforcement of the Union grievance procedure provisions of Article V, in defiance of the Union contract exemption of

Subdivision (10), is attempted to be justified in the Board's decision, and in its brief, by the contention, piously made (pp. 13-17), that a grievance procedure is "an appropriate subject" of collective bargaining. It is pointed out that it is very important that an effective grievance procedure be established; that this is just as important as having an efficient judicial system in society generally.

All this may be conceded, but there is no suggestion whatever in the record, or in the Board's brief, that there is anything unfair or unjust, inappropriate, inefficient, or otherwise objectionable, in the grievance procedure suggested by the notice upon which the complaint is based. The various contentions advanced (App. Br. pp. 11-17) with reference to the importance of the grievance procedure must fall before this obvious record fact; and if the provisions of the contract, Subdivision (10) of Art. V are to be given effect, the contentions of the Board, which are in direct antithesis to this subdivision, must be rejected.

But the Board's solicitude for the establishment of a proper grievance procedure is revealed at page 28 of the brief as based not upon any suggestion of unfairness or inadequacy of the method provided for disposition of individual grievances, but rather upon the claim that the system suggested might conceivably be demonstrably more efficient than the corresponding Union procedure, so that the employees would prefer it to the Union procedure!

At page 28, footnote 21, by way of illustration, it is stated:

> "Thus, respondent might, for example, establish a grievance procedure for presentation of individual

> grievances which provided for submission of grievances directly to the highest officials of respondent and thereafter to a committee of three non-supervisory employees in the department involved. The destructive effects upon the Union's representative status which would inevitably flow from such a course require no elaboration; employees could scarcely be expected in such circumstances to use the Union as their representative."

Here we have an unabashed confession of the Board's paramount interest in the welfare of the Union as an end in itself, regardless of the interests of the employees, overlooking again the principle enunciated by this and other courts that the purpose of the National Labor Relations Act was not to furnish a vehicle for the exploitation of the employee even by the Union, but that the right of non-association is of equal importance with the right of association and must be equally protected by the Board.

> *N. L. R. B. v. Sterling Motors* (C. C. A. 9), 109 Fed. (2d) 194, 202.

But the record in the present case is a direct refutation of the hypothesis suggested by the Board. The offer of proof which the Board rejected, but which they finally assumed to be true, was that only two instances of individual grievance determination had, occurred, as against more than 800 through the Union procedure. Finally, in order to support the order of the Board on this basis some pleading or proof of favoritism was necessary which was not attempted in the present case, the Board consistently refusing to consider any evidence as to the operation of the grievance procedure. [R. pp. 146-147.]

IV.

The Right to Present Grievances Individually Involves a Corresponding Duty Upon the Part of the Company to Receive, Hear, and Adjust the Grievances by Arbitration, if Necessary, i. e., by the Utilization of a Reasonably Fair and Effective Procedure.

Both by contract and by statute, the individual employee or any group of employees have a right to present grievances to the management. This right, as we have seen, is not limited to the mere filing of the claim. (Point II, *supra.*)

The Statutory Right and Also the Contract Right Granted to Employees to Individually Present Their Grievances to the Employer Involves the Corresponding Duty on the Employer to Hear and Adjust Such Grievances.

The duty to deal involves the right to insist on dealing.

In *Grace Co. v. Williams* (D. C. Mo.), 20 Fed. Supp. 263, 266, the court said with reference to the duty of an employer to deal with the representative of the employees:

> "the imposition of the duty must of necessity carry with it the right on the part of the employer to insist upon and enforce, if necessary, its right to perform that duty."

This, again, is the direct holding of the case of *National Labor Relations Board v. Union Pacific Stages* (C. C. A. 9), *supra*, 99 Fed. (2d) 153, and other cases cited *infra*, subdivision (c), Point II.

". . . 'right' and 'obligation' are correlative terms."

City v. Prestonettes, Inc., 285 Fed. 501, 514 (C. C. C. A. 2, 1922).

Right as used in the legal sense

"implies something with which the law invests one person, and in respect to which, for his benefit, another, or perhaps all others, are required by the law to do or perform acts . . ."

Galveston H. & S. A. Ry. Co. v. Hennigan, 76 S. W. 452 (Tex., 1903).

It is an elemental rule of statutory construction that the grant of a power or right

"carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete." (59 *Corpus Juris.*, p. 973.)

Dooley v. Penna. Ry. Co. (D. C. Minn.), 250 Fed. 142, 143.

V.

The Necessity of Providing for Such a Hearing and Determination Justifies, and in Fact, Necessitates, as a Practical Matter, the Giving of a Notice Setting Forth the Date, Place and Manner of Hearing and Determination of the Grievance.

The Company, in order to comply with its contract and statutory duty of hearing and determining individual grievances, could properly designate representatives to hear the grievance, fix a time and place of hearing, and make any other fair or reasonable arrangements for the disposition of the grievance. Certainly if the Company was authorized to fix such reasonable arrangements, it was equally authorized to give notice thereof. In fact, in a concern involving as many employees as respondent, it may be said that in the duty to hear such grievances is implicit the duty to give due notice to the employees of any arrangements made for the disposition of individual grievances.

The Board has cited no authority, and has made no argument to the effect that the giving of notice of the arrangements for individual grievance presentation and determination as distinct from the fixing of such procedure is objectionable.

As was stated in *Grace Co. v. Williams* (D. C. Mo.), 20 Fed. Supp. 263, 266, the imposition of the duty to deal

> "must of necessity carry with it the right on the part of the employer to insist upon and enforce, if necessary, its right to perform that duty."

The right to give notice of a procedure for receiving and passing upon individual grievances is incident to the duty to receive and pass thereon.

The situation is analogous to that of the rule-making power of the courts or other administrative tribunals.

In the case of *Byers v. Smith,* 4 Cal. (2d) 209, 213, the court stated that the principle appearing in C. C. P., Section 187, constituted "a well-known rule of law." That principle is:

> "'When jurisdiction is, by the constitution or this code or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of procedure may be adopted which may appear most conformable to the spirit of the code.'"

The right of grievance presentation requires that an opportunity for presentation be afforded, and such opportunity is not afforded until and unless notice thereof is given.

VI.

Any Objection as to the Scope or Terms of the Notice Stating the Method of Determination of Grievances Is Not Available Upon This Proceeding, Because There Was No Pleading or Proof That the Method Suggested Was Improper, or That Other Grievances Than Those Properly Determined Individually Were Heard and Passed Upon.

As we have seen the complaint was based entirely upon the charge that the notice to the employees was given without the knowledge or consent of the Union, and provided for a determination of grievances without the Union's knowledge, consent, or participation. [R. p. 4.] There was no issue whatever as to the *scope* or terms of the notice; likewise there was no proof as to such scope permitted by the Board.

Also, there was no issue as to the propriety of the provision for arbitration, which the Board in its decision seems to regard as invalidating the procedure. In any and all events, it is submitted that there is no limitation in the Act as to the type of grievances which an individual may present; likewise there is no such limitation in the contract; and that a provision for arbitration does not, under any conceivable circumstance, vitiate the procedure.

(a) There Is No Issue as to the Scope of the Grievances Covered by the Notices Complained of.

The complaint was not that the notice provided for the hearing of other grievances than those properly presentable by the individual employee, but that the notice was distributed without consultation with the Union, and provided for determination of grievances without the Union's knowledge, consent, or participation. In other words, it was not the type of grievance, but the "unilateral" dissemination of the notice and the fact that the procedure did not provide for Union participation. There is no other ground of objection stated in the complaint, and no other ground is available in this court in support of the order of which enforcement is sought.

Under the complaint it is the establishment of an individual bargaining procedure, regardless of the scope of the matters contemplated, which is the basis of the charge. The theory of the complaint is that there is no right of individual grievance presentation whatever except such as the Union may bestow.

The Board, throughout, has ignored the provision of the contract which guarantees the right of individual grievance presentation without interference from the Union, and without regard to the provisions governing Union grievance procedure.

(b) Even if There Were Any Issue as to the Scope of the Notice, Which There Is Not, There Was No Proof That Any Grievances Not Properly Presentable Were Actually Presented.

In fact, there was no proof that any grievances at all were presented under this procedure. The Company's offer of proof as to grievances referred to was rejected. [R. pp. 146-7.]

It cannot be assumed, in the absence of evidence, that the law has been or will be violated, but on the contrary, there is a presumption that the law will be obeyed.

In the Board's brief, pp. 21-28, it is suggested that

> "there are no limitations upon the nature or type of grievances which may be submitted by individual employees." (p. 21.)

Again we point out that there was no charge that the notice was illegal because it contained no limitations.

We call attention, also, to the fact that the Board has failed to show just *what limitations* should be imposed in order to comply with the law and the contract. No authority has been cited, and none exists, which imposes any limitation whatever upon the type of grievances which may be presented individually by the employee.

(c) There Is No Limitation in the Act, or in the Labor Contract, as to the Character of Matters Which May be Presented as Individual Grievances, and No Limitations Can be Interpolated by the Board or the Court.

The Board concedes in its decision, and states in its brief, that "individuals may present grievances * * *" (p. 22), but there is an entire absence of any indication of the Board's position as to the scope of grievances properly presentable by an individual.

The suggestion is offered (p. 23) that whatever grievances are presented by the individual employees must be settled in accordance with contract provisions, or in accordance with the precedence and interpretations arrived at through the rulings on the grievances presented by the bargaining representative. The Board makes a similar statement in its decision. [R. pp. 62-63.]

Neither the decision of the Board nor its brief gives any clue to the nature of grievances which they consider would be properly presented by an individual. As we have seen, the suggestion that they must be settled in accordance with the precedents arrived at through the Union grievance procedure is entirely unsupported.

Even if true, it would be immaterial in the present controversy. There is no issue as to whether or not any individual grievance has been or will be settled in accordance with any particular precedent or set of precedents, nor can there be any such issue, as there is no pleading or proof of any particular determination.

It is submitted that Congress used the term "grievances" in its usually accepted sense, and in reserving the right to an individual employee or group of employees "*at any time to present grievances to their employees*" it

did not impose any qualification or limitation on the type of grievances. The same is true of subdivision (10) of Article V.

The language of the Act is not subject to any interpretation which would limit the right of individual grievance presentation to any particular type.

The suggestion that the congressional hearings indicate an intention to limit the right of individual grievance presentation appearing in the Board's brief (pp. 24-27), is immaterial in view of the fact that *there is no ambiguity in the language used.*

If the right of individual grievance presentation, as the Board suggests in its brief, p. 12, is a delimitation of the right of collective bargaining, then it is undeniable that such delimitation is exactly what Congress expressly provided, and the argument of the Board is one which should be addressed rather to Congress than this court.

Neither the Board nor the courts can deny effect to the proviso of Section 9 (a) upon the ground that it might embarrass the Union or possibly lead to difficulties in administration. That the ruling in the case of an individual grievance might not accord with other rulings made under the Union grievance procedure is not an argument against the right of individual grievance presentation nor, as stated, is such right debatable. The Union has ample recourse under the ordinary grievance procedure to satisfy any legal prejudice or detriment which it might sustain; but the protection of the Union in the right of collective bargaining does not require the denial of individual grievance presentation.

(d) The Fact That a Method of Individual Grievance Presentation Provides for Settlement by Arbitration Does Not Render the Procedure Illegal or a Violation of the National Labor Relations Act.

It was the Board's opinion that the individual grievance procedure suggested was entirely vitiated by the bare fact that it contained a provision for settlement by arbitration. [R. pp. 29, 30, 35, 36, 37.]

Apparently the Board does not rely upon this contention in its brief, but merely suggests that the decisions on individual grievances must be in accordance with the precedents and interpretations obtained in rulings on the Union grievance procedure; and in connection with this observation, the Board's brief suggests that the notice complained of would permit the disposition of grievances "by respondtent unilaterally, or by an arbitrator," as though this carried some sort of a stigma of illegality.

We repeat that it would be idle to provide for presentation of grievances without authorizing or requiring that such grievances be finally determined. Determination by arbitration is the commonly accepted method, not only in the case of labor relations, but in all similar business transactions. The right of collective bargaining and the Union's contention with respect to any particular issue cannot possibly be affected in any way by any arbitration which may be had on an individual grievance. These rights remain identically the same as though no arbitration had been had as to an individual grievance, and exactly the same as though no provision were made for arbitration of individual grievances.

The effect on the Union of settlement by arbitration would be the same—no more and no less—if the grievance were adjusted by mutual discussion directly between employer and employee.

Again we suggest that the only substantial or meritorious question is whether provision is made for a fair and just determination of the grievance; but in this case neither the Union nor the Board are at all interested in this matter, and there is no issue with respect thereto.

If the employer and employee can mutually agree between themselves upon a particular settlement or disposition of a grievance, it would equally follow that they can agree to abide by a settlement fixed by a third party; and, in fact, it would appear that less interference with the Union's asserted domain would result if all grievances individually presented were settled exclusively by the method of arbitration. It is submitted that the mere addition of a provision for reference to an arbiter in the event of failure of attempts at mutual adjustment cannot transform a legal plan of individual grievance handling into illegal "bargaining" in contravention of any right of the Union.

(e) The Notice Complained of Is Not Objectionable as Improper Solicitation of Individual Grievance Presentation.

The Board's decision states that the individual grievance procedure method "was referred to as the Company's policy," and that this constituted an implication that respondent preferred the individual grievance procedure, and was inviting employees to use it rather than the contract procedure. [R. p. 64.] The same statement is repeated in the Board's brief, pp. 3, 8, 27, 28.

This oft-repeated charge has no more substantial basis than the opening sentence of the notice, which reads as follows:

> "In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievances directly to the management."

This is nothing more or less than a statement that the Act of Congress and the policy of the Company both provide for individual grievance presentation. The statement with reference to the provision of the Act is incontestably true. The statement that it is the policy of the Company to give effect to the privilege granted by the Act is certainly not unfair labor practice.

Indeed, the complaint did not charge any unfair labor practice in this respect, or any solicitation of individual grievance procedure, or show any facts indicating that any employee had been deceived or had supposed that any preference was intended. Even if the contention of the Board in this respect were supported by the record, which it is not, the issues are framed by the complaint and must be determined thereon. There was no issue of solicitation or coercion of employees in any particular whatever, or of any illegal favoritism; and even if such an issue had been raised, it is clear under the cases that the notice complained of was much less objectionable in these respects than the notices discussed in cases referred to in Point II, *supra*.

Midland Steel Products Company v. N. L. R. B. (C. C. C. A. 6), 113 Fed. (2d) 800, 803;

N. L. R. B. v. Gutmann & Co. (C. C. A. 7), 121 Fed. (2d) 756, 759-60.

(f) There Is No Issue in the Present Case as to the Scope of Individual Grievance Presentation, as Distinct From Collective Bargaining.

The Board's decision, likewise its brief (pp. 13 and 14, and throughout), condemns individual presentation of grievances as an encroachment upon the Union's domain of collective bargaining. This is attended by a process of extending the definition of collective bargaining to include any adjustment of any grievance, thus distorting the mean-

ing of the term of "collective bargaining" as used in the statute.

As this court has held, the procedure for individual grievance adjustment

> "is entirely consistent with collective bargaining in matters affecting employees as a class." (*Union Pacific Stages* case, *supra.*)

Collective bargaining is ordinarily used in the sense of denoting the process by which an agreement is arrived at. Grievance procedure involves, not the question of new contractual relations, but simply the matter of whether there has been a breach of existing contractual or other duty and the measure of redress therefor.

Webster's Dictionary defines the term collective bargaining as:

> "Negotiation for the settlement of the terms (for example, as to wages) of a labor contract between an employer or group of employers on the one side and an organized body of workers on the other."

The same authority defines a grievance as:

> "Cause of uneasiness and complaint; wrong done and suffered."

Regardless of the proper definition of the term, the notice itself did not contemplate the hearing of any grievances not properly presentable individually. In fact, the reference is to such grievances as the employee may present "in accordance with the National Labor Relations Act." There is no proof, and it cannot be assumed, that the employer has determined any grievances not properly presentable by the individual employee.

There was no issue as to the scope of the grievances covered by the notice, and no proof was permitted as to

the character of grievances which had been actually had pursuant thereto.

Finally, we submit that the order of the Board can not be sustained except by holding that it is illegal to establish a procedure for direct handling of individual grievances. This is the sole charge contained in the complaint. There is no issue as to the scope of grievances properly presentable, nor is there any issue as to the legality or illegality of the method established for handling the procedure. The sole issue is can *a* direct procedure be legally established without the consent of the Union.

As stated by the United States Supreme Court in the case of *United States v. Gilmore,* 7 Wall. 491, 19 L. Ed. 292, 293:

> "The object of pleading is to concentrate the controversy upon the questions of fact and of law, which should control the result. The value of the system in the administration of justice can hardly be too highly estimated."

To the same effect is

Reed v. Munn (C. C. A. 8), 149 Fed. 737, 743.

VII.

The Order of the Board Is Too Broad.

The sole issue is the propriety of the giving of notice of the method for handling individual grievances, without the consent of or consultation with the Union. On the present record the Board can only direct the recall of the notice. It cannot even direct a modification of the notice as there was no issue as to the scope of the notice.

N. L. R. B. v. Express Pub. Co., 312 U. S. 426, 435-6; 85 L. Ed. 930, 937;

Bethlehem Steel v. N. L. R. B. (C. C. A. D. C.), 120 Fed. (2d) 641, 707-8.

As stated in *N. L. R. B. v. Express Pub. Co.*, 312 U. S. 426, 435-6, 85 L. Ed. 930, 937:

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

Conclusion.

The order for which enforcement is sought requires respondent to cease and desist from refusing to bargain collectively with the Union, and requires respondent, upon request, to bargain collectively with the Union. [R. pp. 68-69.]

But there is no charge in the complaint and the evidence shows that there is no basis for any charge that respondent ever refused to bargain collectively with the Union at any time about any matter whatever. Paragraphs 1.(a). and 1.(c). and 2.(a). [R. pp. 68-69] of the order are therefore null and void upon the face of the record.

The only charge of refusal to bargain collectively is that the giving of the notice complained of amounted to a refusal to collectively bargain; and this is the only charge upon which the order can be based. However, the record shows that respondent was willing to negotiate with the Union the question of the propriety of the issuance of such notice, and did, in fact, do so up to the final step of the grievance procedure. It was the Union that refused to negotiate further. The employer has always been willing to negotiate in the matter. The portion of the order which would require the employer to declare the notice null and void and announce that it would give no effect thereto [R. pp. 68-9], would relieve the Union from its contractual obligation to negotiate any dispute with reference to the propriety of the notice.

Respondent would be rendered powerless to put into effect any method for handling of grievances presented in-

dividually under Section 9(a) of the Act, or under Article V, Subdivision 10 of the contract, except with the Union's consent. The result would be the effectual repeal of the proviso to Section 9(a)—the accomplishment of which is undoubtedly the purpose of the present proceedings—and the rewriting of the contract between the parties by which the Union grievance procedure is expressly made inapplicable to individual grievance presentation.

It is respectfully submitted that the direct and unequivocal reservation to the individual employee of the right to individually present grievances, which reservation appears both in the statute Section 9(a), and in the contract, must be given a reasonable construction, and one which will afford the employer an effective and practical means of obtaining redress, as to any and all grievances, without interference from the Union; that the fulfillment of its duty to receive such grievances enforces upon the employer the obligation to give reasonable opportunity of presentation and notice to employees thereof.

The notice complained of constituted nothing more nor less than affording an opportunity for individual grievance presentation. It is not charged that the opportunity thus given is otherwise than full and fair. The only criticism in the complaint is that (1) the opportunity for a hearing was granted without the consent of the Union, and (2) that provision is made for the privilege of a hearing without Union participation.

It is respectfully submitted that the foregoing issues have already been authoritatively determined in accordance

with respondent's position herein by the decisions of this court.

It is therefore respectfully submitted that the order of the Board is null and void and its enforcement should be denied.

Respectfully submitted,

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